In The

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1334

DON BORDENKIRCHER, SUPERINTENDENT
KENTUCKY STATE PENITENTIARY ..... PETITIONER

V.

PAUL LEWIS HAYES ..... RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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INDEX

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

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MAY IT PLEASE THE COURT:

OPINION BELOW

The judgment and order of the United States Court of Appeals for the Sixth Circuit in this case is reported as *Hayes* v. *Cowan*, 547 F. 2d 42 (6th Cir. 1976). The opinion and order are set out in full in the Appendix to the Briefs, hereafter "App.," at pages 83-89.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was decided and filed on December 30, 1976. The petition for a writ of certiorari was filed on March 28, 1977, and was granted on June 6, 1977. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTION PRESENTED

WHETHER THE COMMONWEALTH'S ATTORNEY IS PROHIBITED FROM BARGAINING FOR A PLEA OF GUILTY BY THREATENING TO BRING AN ADDITIONAL INDICTMENT IF AN ACCUSED DOES NOT ACCEPT A PLEA BARGAIN OFFER.

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the United States Constitution involved are the Fifth, Sixth and Fourteenth Amendments. The text of these Amendments is set forth in an addendum to this brief.

STATEMENT OF THE CASE

The facts which led to Paul Lewis Hayes' conviction and incarceration are not disputed. Hayes, respondent herein, was indicted by the Fayette County Grand Jury, Lexington, Kentucky, on January 8, 1973, for the charge of uttering a forged instrument under Kentucky Revised Statute (KRS) 434.130. After arraignment, pretrial conferences were held with the Commonwealth's attorney on January 24 and 26, 1973. During these conferences the

prosecutor offered to recommend a five-year sentence if Hayes would plead guilty to uttering a forged instrument. Conviction for uttering a forged instrument carried a penalty of from two to ten years in prison. Hayes was told that if he did not plead guilty, he would be charged under the then Kentucky Habitual Criminal Act, KRS 431.190[1]. Hayes chose not to plead guilty.

The prosecutor thereupon returned to the grand jury on January 29, 1973, and obtained an indictment charging Hayes under the Habitual Criminal Act.

A bifurcated trial was held in the Fayette Circuit Court, Lexington, Fayette County, Kentucky, on April 19-20, 1973, and a conviction was returned on both the principal charge and as an habitual criminal. As required by the habitual criminal statute where conviction is had on the principal charge and of having twice before been convicted of felonies, Hayes was sentenced to life in the penitentiary.

At the beginning of the second phase of the trial for consideration under the habitual criminal indictment, Hayes on his own objected to the manner in which he had been indicted on the habitual criminal charge. The facts concerning this matter were admitted by the prosecutor during his cross-examination of Hayes at the trial. The prosecutor said:

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[1]**The text of KRS 431.190 is set forth in the addendum to this brief. This statute has been repealed. The Kentucky Penal Code provision dealing with persistent felony offenders is KRS 532.080 which is also set forth in the addendum to this brief.**

> "[I]sn't it a fact that I told you if you did not intend to save the court the inconvenience and necessity of a trial and taking up this time that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions?"

See App. 50. Hayes' refusal to plead guilty clearly lead to his indictment under the habitual criminal statute.

The issue involved in the petition for certiorari of whether the Commonwealth's attorney, as the representative of the state, is prohibited from bargaining for a plea of guilty by threatening to bring an additional indictment if an accused does not accept a plea bargain offer, was raised on direct appeal by Hayes to the Kentucky Court of Appeals, the then highest appellate court in the Commonwealth. Hayes argued that his Fifth, Sixth and Fourteenth Amendment rights were abridged by the prosecutor's action in bringing the habitual criminal charge. The Kentucky Court of Appeals affirmed Hayes' conviction on March 1, 1974, in an unreported memorandum opinion saying Hayes had risked the maximum sentence of life imprisonment for a sentence of five years and that he "cannot now complain of his bad bargain." See App. 53-57.

A Petition for a Writ of Habeas Corpus was filed on June 11, 1975, in the United States District Court for the Eastern District of Kentucky. A Magistrate's Report and Recommendation was also filed on June 11, 1975, wherein the opinion was that the petition was "patently without merit." See App. 58-62; 70-73.

On September 9, 1975, Judge Bernard T. Moynahan, Jr., entered an order adopting the Magistrate's Report and

Recommendation and thereby denied the Petition for Writ of Habeas Corpus. See App. 75.

After an Application for Certificate of Probable Cause was filed in the United States District Court on October 9, 1975, Judge Moynahan entered an order on December 19, 1975, declining to issue a Certificate of Probable Cause and specifically finding that the appeal sought was frivolous, not taken in good faith, and not presenting a substantial question. See App. 79-81.

An appeal was taken to the Sixth Circuit Court of Appeals. In an opinion rendered December 30, 1976, the Sixth Circuit held that the Commonwealth had violated Hayes' due process rights by placing him in fear of retaliatory action for insisting on his constitutional rights to stand trial before a jury. It is from this order of the United States Court of Appeals for the Sixth Circuit that a review is sought.

SUMMARY OF ARGUMENT

This case involves a current bargaining practice used in plea discussions. It is the petitioner's position that the realities of plea discussions involving charges unbrought but legally susceptible of being brought is that it is entirely appropriate, legally and constitutionally, for the prosecutor to offer to the accused not to seek indictments on the additional charges for a plea of guilty to a charge already brought.

The inevitable effect of plea bargaining is to discourage the assertion of the Fifth Amendment right not to plead guilty and to deter the exercise of the Sixth Amend-

ment right to demand a jury trial. There is no arguable constitutional problem with the fact that an accused faced with plea discussions has to choose whether to exercise his Fifth and Sixth Amendment rights or that a greater sentence will most likely be imposed on a defendant who is convicted after trial than on the defendant who pleads guilty.

It is recognized that certain practices of plea bargaining are not permitted. In considering what a prosecutor may do to induce a plea of guilty it must be remembered that the role of the prosecutor is that of the natural adversary of the defendant. A prosecutor should be at liberty to induce pleas of guilty through plea discussions by accepting pleas to selected counts, to lesser included offenses, for recommendations to sentence, or to reduced charges, dismissal of other charges or potential charges against a defendant.

In the present case before the Court, the respondent herein, Paul Lewis Hayes, had been indicted for uttering a forged instrumnt which charge carried a possible two to ten-year sentence. The prosecutor had overwhelming evidence of Hayes' guilt. Hayes was offered five years for a plea of guilty to the uttering charge and refused it. Thereafter the prosecutor went back to the grand jury and obtained an indictment under the then habitual criminal statute for two prior felony convictions. Hayes was convicted on the uttering charge and under the enhancement statute and sentenced to life in the penitentiary.

After a direct appeal to the highest appellate court in the Commonwealth and an unsuccessful seeking of habeas corpus relief in the federal district court, the United States

Court of Appeals for the Sixth Circuit found the practice of plea bargaining used in this case unconstitutional under the Fourteenth Amendment due process doctrine of *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), and *Blackledge* v. *Perry*, 417 U.S. 21 (1974)

It is submitted that the Sixth Circuit misapplied the reasoning and technique of this Court's decisions of *North Carolina* v. *Pearce* and *Blackledge* v. *Perry* to the facts and practice involved in the present case now before this Court. The Sixth Circuit's decision in the present case illogically applied the principle announced in *North Carolina* v. *Pearce*, even as extended to prosecutorial conduct in *Blackledge* v. *Perry*, to a situation far removed from the problem for which the principle was designed, and the lower federal court decisions cited by the Sixth Circuit illustrate this misapplication.

The application of a prophylactic rule to the plea bargaining practice in this case does not square when the realities of various practices of plea bargaining are analyzed. The end result of the procedure used by the prosecutor in this case was no more vindictive so as to impose an impermissible burden upon the assertion of trial rights than is the frequent situation where a prosecutor indicts on a principal charge and also under an enhancement statute and then bargains for a plea of guilty to the principle charge on the promise the prosecutor will make a motion to drop the habitual criminal charge.

There are good reasons for not indicting on an enhancement charge in the first instance and these reasons work to the advantage of the accused rather than the pro-

scutor. For example, if there is no enhancement charge, the amount set for bail will usually be significantly less.

For the above reasons the petitioner believes that a prosecutor may constitutionally seek an additional indictment, specifically under an enhancement statute, if an accused chooses to stand trial rather than plead guilty to an offer made by the prosecutor on the original charge.

ARGUMENT

THE COMMONWEALTH'S ATTORNEY IS NOT PROHIBITED FROM BARGAINING FOR A PLEA OF GUILTY BY THREATENING TO BRING AN ADDITIONAL INDICTMENT IF AN ACCUSED REJECTS A PLEA BARGAIN OFFER.

This case involves the "venerable institution of plea bargaining." *Parker* v. *North Carolina*, 397 U.S. 790, 808 (1970). The petitioner asks this Court to review a current bargaining practice used in plea discussions. It is our position that the bargaining practice evident in this case does not suffer any constitutional taint. We believe the realities of plea discussions involving charges unbrought but legally susceptible of being brought is that it is entirely appropriate, legally and constitutionally, for the prosecutor to offer to the accused not to seek indictments on the additional charges for a plea of guilty to a charge already brought.

Plea bargaining has been defined as "a process of negotiation in which the prosecutor offers the defendant certain concessions in exchange for a guilty plea." *The Unconstitutionality of Plea Bargaining*, 83 Harv. L. Rev. 1387, 1389 (1970). To some the very words "plea bar-

gaining" carry with them an evil connotation and such phrases as "plea discussions" and "plea agreements" are preferred in reference to discussions between the prosecutor and defense counsel or defendant concerning the plea and to the understanding which is reached as a result of these discussions. See American Bar Association, *Standards Relating to Pleas of Guilty* (Commentary, Section 3.1(a), Approved Draft 1968). No matter what phrase one uses to describe it or how well one likes or despises it, the negotiation of pleas of guilty plays an important function in our criminal justice system. However, as Mr. Justice Stewart wrote in the recent case of *Blackledge v. Allison*, 45 U.S.L.W. 4435, 4437 (May 2, 1977):

> "Only recently has plea bargaining become a visible practice accepted as a legitimate component in the administration of criminal justice. For decades it was a *sub rosa* process shrouded in secrecy and deliberately concealed by participating defendants, defense lawyers, prosecutors, and even judges. Indeed, it was not until our decision in *Santobello v. New York*, 404 U.S. 257, that lingering doubts about the legitimacy of the practice were finally dispelled."

In *Santobello* v. *New York*, 404 U.S. 257, 260 (1971), Mr. Chief Justice Burger in delivering the opinion of the Court stated: "The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged." Mr. Chief Justice Burger went on in *Santobello* to speak of the desirable reasons for plea discussions (404 U.S. 261):

> "Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative propects (sic) of the guilty when they are ultimately imprisoned." (Citation reference omitted.)

Another court has stated that the reason plea bargaining is sanctioned is because without it the system of criminal justice could not function effectively and that even with plea bargaining, there are "severe backlogs, scarce judicial resources, and overworked attorneys" and that the "perceptions as to the desirability of plea bargaining are no doubt influenced by pragmatic considerations." *United States* v. *DeMarco*, 401 F. Supp. 505, 511 (C.D.Ca. 1975). Simply put, then, the chief virtues of the plea system are "speed, economy, and finality." See *Blackledge* v. *Allison*, 45 U.S.L.W. 4435, 4438 Bluntly put, plea bargaining serves to avoid utilizing the jury trial system established by the United States Constitution.

The constitutional protections of trial include the Fifth Amendment privilege against self-incrimination, in the context of plea bargaining referred to as the right not to plea guilty, and the Sixth Amendment rights to trial by jury, to compulsory process for obtaining favorable witnesses, and to confront one's accusers. The inevitable effect of plea bargaining, then, is always to discourage the assertion of the Fifth Amendment right not to plead guilty and to deter the exercise of the Sixth Amendment right to demand a jury trial. See *United States* v. *Jackson*, 390 U.S. 570, 581 (1968). However, there can be no per se violation of an accused's constitutional rights through plea bargaining because if it was, the "venerable institution" itself would have to be done away with.

This Court has made clear that the Constitution does not forbid every state imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights. See *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 30 (1973), citing *Brady* v. *United States*, 397 U.S. 742 (1970), *Parker* v. *North Carolina*, 397 U.S. 790 1970), and *North Carolina* v. *Alford*, 400 U.S. 25 (1970). Mr. Justice Powell, in *Chaffin*, further commented on this matter that: (412 U.S. 30-31)

> "Brady is particularly instructive. The Court there canvassed several common plea-bargaining circumstances in which the accused is confronted with the 'certainty or probability' that, if he determines to exercise his right to plead innocent and to demand a jury trial, he will receive a higher sentence than would have followed a waiver of those rights. 397 U.S., 751, 25 L.Ed. 2d 747. Although every circumstance has a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices was upheld as an inevitable attribute of any legitimate system which tolerates and encourages the negotiation of pleas."

Mr. Justice Powell continued, quoting from Mr. Justice Harlan's opinion for the Court in *Crampton* v. *Ohio,* a companion case to *McGautha* v. *California,* 402 U.S. 183, 213 (1971): (412 U.S. 32)

> "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. . . . Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose."

Thus, there is no arguable constitutional problem with the fact that an accused faced with plea discussions has to choose whether to exercise his Fifth and Sixth Amendment rights or that a greater sentence will most likely be imposed on a defendant who is convicted after trial than on the defendant who pleads guilty. Moreover, it is quite clear that if an accused does decide to waive his Fifth and Sixth Amendment rights after plea negotiation, such a plea must be measured against the requirements of *Boykin* v. *Alabama,* 395 U.S. 238 (1969), and its progeny from this Court, and in federal criminal cases, of Federal Rule of Criminal Procedure 11.

Because of the desirable reasons for engaging in plea bargaining, it is admitted that prosecutors attempt to structure a criminal case so that a defendant will choose not to go to trial. The American Bar Association, in its *Standards Relating to Pleas of Guilty* (Approved Draft 1968), at Section 3.1, page 60, sets forth standards relating to the propriety of plea discussions and plea agreements. Section 3.1 reads as follows:

"3.1 Propriety of plea discussions and plea agreements.

(a) In cases in which it appears that the interest of the public in the effective administration of criminal justice (as stated in section 1.8) would thereby be served, the prosecuting attorney may engage in plea discussions for the purpose of reaching a plea agreement. He should engage in plea discussions or reach a plea agreement with the defendant only through defense counsel, except when the defendant is not eligible for or does not desire appointment of counsel and has not retained counsel.

(b) The prosecuting attorney, in reaching a plea agreement, may agree to one or more of the following, as dictated by the circumstances of the individual case:

(i) to make or not to oppose favorable recommendations as to the sentence which should be imposed if the defendant enters a plea of guilty or nolo contendere;

(ii) to seek or not to oppose dismissal of the offense charged if the defendant enters a plea of guilty or nolo contendere to another offense reasonably related to defendant's conduct; or

(iii) to seek or not to oppose dismissal of other charges *or potential charges against the defendant* if the defendant enters a plea of guilty or nolo contendere.

(c) Similarly situated defendants should be afforded equal plea agreement opportunities." (Emphasis supplied.)

It is recognized that while plea bargaining is worthwhile and has been sanctioned by the American Bar Association, there are certain forms or practices of plea bargaining that are not permitted. Chief Justice Burger, in *Santobello* v. *New York*, 404 U.S. 257, 265-266 (1971), stated that "a guilty plea is rendered voidable by threatening physical harm, . . . , threatening to use false testimony, . . . , threatening to bring additional prosecutions, . . . , or by failing to inform a defendant of his right of counsel." The agents of the State may not produce a plea "by mental coercion overbearing the will of the defendant." *Brady* v. *United States*, 397 U.S. 742, 750 (1970). Neither, we believe, may a prosecutor induce a particular defendant to tender a plea of guilty by "threatening prosecution on a charge not justified by the evidence. . . ." *Brady*, at 751, footnote 8. But in considering what a prosecutor may do to induce a plea of guilty it must be remembered that the role of the prosecutor is that of the natural adversary of the defendant. See *Blackledge* v. *Perry*, 417 U.S. 21, 33 (1974), Mr. Justice Rehnquist, dissenting. One of the prosecutor's "traditional functions has been that of determining society's interest in individual cases, as manifested by the long-recognized discretion of the prosecutor in determining whether to charge and *what to charge*." (Emphasis supplied.) See ABA *Standards Relating to Pleas of Guilty*, Commentary to Section 3.1(a), at page 63; and Note, *Guilty Plea Bargaining: Compromises By Prosecutors to Secure Guilty Pleas*, 112 U.Pa.L.Rev. 865, 879 (1964). As an extension of that discretion, in the context of plea bargaining, a prosecutor should be at liberty to induce pleas of guilty through plea discussions by accepting pleas to selected counts, to lesser included offenses,

for recommendations as to sentence, or to reduced charges, dismissal of other charges or potential charges against a defendant. See *Brady* v. *United States*, 397 U.S. 742, 753, (1970), and ABA *Standards Relating to Pleas of Guilty*, Section 3.1(b)(iii), at page 60.

The exercise of discretion of the prosecutor and practice of plea bargaining involved in the present case consisted of several promises. Hayes had been indicted for uttering a forged instrument which carried a possible two to ten-year sentence. The prosecutor had very strong evidence of Hayes' guilt of this charge. See the Memorandum Opinion of the Kentucky Court of Appeals, the then highest appellate court in the Commonwealth. App. 53-57. The prosecutor, in plea discussions with Hayes, who had counsel, offered to seek a sentence of five years in the penitentiary if Hayes would enter a plea of guilty to the uttering a forged instrument charge. Hayes chose to reject the prosecutor's offer. In turn the prosecutor threatened to do that which had not at that time been done — seek an indictment on the charge within his discretion to be brought, that was, for Hayes to be considered as an habitual criminal. The prosecutor did not lack the power nor was he statutorily prohibited from going back to the grand jury for an indictment on the habitual criminal charge. At all times the only question confronting Hayes was whether or not to exercise his trial rights. Confronted with the choice of entering a plea of guilty on the charge of uttering a forged instrument with a five-year sentence recommendation by the prosecutor in the offing or going to trial on the uttering charge *and* the habitual criminal charge, the situation he was subject of being placed in from the beginning, Hayes unreasonably chose, in view of

the overwhelming evidence against him, to stand trial before a jury. Hayes was found guilty of the uttering of a forged instrument and as required by the then habitual criminal statute, with two prior felony convictions, was sentenced to life imprisonment. It is the petitioner's position that the prosecutor could constitutionally seek any charge permissible by law, including under the enhancement statute after rejection of the plea offer by Hayes.

The issue presented by this case is whether Hayes should have been entitled to exercise his prerogative not to plead guilty and go to trial without being confronted with the prosecutor seeking an indictment carrying with it the possibility of a greater sentence after the plea discussions broke down. The position of the United States Court of Appeals for the Sixth Circuit on this issue was that a prosecutor may not constitutionally seek an additional indictment, specifically under an enhancement statute, if an accused chooses to stand trial rather than plead guilty to an offer made by the prosecutor on the original charge. The Sixth Circuit's finding of the unconstitutionality of the plea bargaining practice involved in this case presently before this Court rested upon the Fourteenth Amendment due process doctrine of *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), and *Blackledge* v. *Perry*, 417 U.S. 21 (1974).

The Due Process Clause, as interpreted by this Court in *North Carolina* v. *Pearce* was based upon the question of whether a defendant who had successfully appealed from a state criminal conviction could be sentenced following retrial to a longer sentence than had been originally imposed. The heart of this Court's position with respect to

resentencing following a successful appeal was expressed in the following lines: (395 U.S. at 725-26)

> "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge."

It is very clear that the *North Carolina* v. *Pearce* decision was the progenitor of the decision rendered in *Blackledge* v. *Perry*. In the latter case this Court extended the *North Carolina* v. *Pearce* principle to prosecutorial conduct in a context where the prosecutor had brought greater charges when the defendant therein exercised a North Carolina statutory right to a *de novo* criminal appeal much like that presently authorized in the Commonwealth of Kentucky. This Court concluded in *Blackledge* v. *Perry* that an increase in charges was impermissible and in violation of the defendant's statutory right of appeal. The nub of this Court's due process analysis and the principle of *Pearce* extended in *Blackledge* v. *Perry* is contained in the following lines: (417 U.S. at 27)

> "[T]he Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of 'vindictiveness' . . . The question is whether the opportunities for vindictiveness in this situation are

such as to impel the conclusion that due process of law requires a rule analagous to that of the *Pearce* case."

Thus, in *Blackledge* v. *Perry* this Court explicitly applied the due process principles of *Pearce* forbidding increased penalties which inhibit the exercise of constitutional rights.

It is submitted that the United States Court of Appeals for the Sixth Circuit misapplied the reasoning and technique of this Court's decisions of *North Carolina* v. *Pearce* and *Blackledge* v. *Perry* to the facts and practice involved in the present case now before this Court. Certainly it should be obvious that the language of this Court in *North Carolina* v. *Pearce* and *Blackledge* v. *Perry* cannot be literally applied to the facts of this case. Concerning Hayes there has been no prior conviction, no appeal from or collateral attack on a prior conviction, no second trial, and only one completed sentencing proceeding. It is recognized that merely because the facts and procedural background of cases are dissimilar to the one under consideration does not prevent the holdings of these cases from applying. But this Court's holdings in *North Carolina* v. *Pearce* and *Blackledge* v. *Perry* involve retaliatory actions by a court or a prosecutor after an attempt to exercise procedural or statutory rights has been made by a defendant. Even assuming this Court's holdings in these two cases do apply regardless of whether an accused "asserts a constitutional right, a common law right, or a statutory right," there exists no right to be bargained with by the prosecutor for a plea of guilty. See *United States* v. *Ruesga-Martinez*, 534 F. 2d 1367 (9th Cir. 1976). Neither the facts, procedure nor anything else about this present case involving plea bargaining falls within the rationale of *Pearce* and *Blackledge* v. *Perry*.

The United States Court of Appeals for the Sixth Circuit attempted to find support for its analysis and application of the *Pearce* and *Blackledge* v. *Perry* holdings in their decision in the present case, which erodes prosecutors' use of their plea bargaining leverage, by citing as being in accord several lower federal court decisions which have limited the prosecutor's discretion "in related situations." *Hayes* v. *Cowan*, 547 F. 2d 42, 44 (6th Cir. 1976); App. 88. In *United States* v. *Jamison*, 505 F. 2d 407 (D.C. Cir. 1974), the accused had been granted a mistrial on an indictment for second degree murder and thereafter was indicted for first degree murder. The Circuit Court found that the possibility of being charged with and convicted of a more serious crime *on retrial* denied the defendant due process. In *United States* v. *DeMarco*, 401 F. Supp. 505 (C.D.Cal. 1975), affirmed in *United States* v. *DeMarco*, 550 F.2d 1224 (9th Cir. 1977), petition for certiorari pending, No. 76-1671, the prosecutorial conduct found to have been improper involved threats calculated to deter the defendant from exercising his federal statutory venue rights. The federal district court stated in the *DeMarco* case at 401 F. Supp. 511 that "while plea bargaining may be necessary for the effective administration of criminal justice, venue bargaining is hardly a necessary component of the prosecutor's arsenal." In *United States* v. *Ruesga-Martinez*, 534 F. 2d 1367 (9th Cir. 1976), after being charged with a misdemeanor and pleading not guilty, the defendant refused to sign a document that would have constituted a waiver of his right to be tried by a district judge, instead of a magistrate, and any right that he had to a jury trial. Thereafter a felony indictment was brought against the defendant.

Thus, the petitioner submits that the Sixth Circuit's decision in the present case illogically applied the principle announced in *North Carolina* v. *Parce,* even as extended to prosecutorial conduct in *Blackledge* v. *Perry,* to a situation far removed from the problem for which the principle was designed, and the lower federal court decisions cited by the Sixth Circuit illustrate this misapplication.

The United States Court of Appeals for the Sixth Circuit's decision has instructed how prosecutors may constitutionally use their plea bargaining leverage. The Sixth Circuit arrived at this decision through an application of the *North Carolina* v. *Pearce* and *Blackledge* v. *Perry* principles as the Court believed these two cases have been interpreted to date. Petitioner asks this Court to determine if, considering the plea bargaining practice involved in the present case, there is a need for a prophylactic rule analogous to that set forth in *Pearce* and *Blackledge.* We believe no such rule is warranted and that if the decision of the Sixth Circuit in the present case is allowed to stand, the role of plea bargaining as an effective tool in the administration of criminal justice will have been significantly diminished.

The application of a prophylactic rule to the plea bargaining practice in this case does not square when the realities of various practices of plea bargaining are analyzed. The end result of the procedure used by the prosecutor in this case was no more vindictive so as to impose an impermissible burden upon the assertion of trial rights than is the frequent situation where a prosecutor indicts on a principal charge and also under an enhancement statute and then bargains for a plea of guilty to the principal

charge on the promise the prosecutor will make a motion to drop the habitual criminal charge. The difference between the leverage and impact involved in the present case and that in the procedure noted above is nonexistent. The constitutional rights to be compromised are the same and the stakes for going to trial are the same. The prosecutor is in both situations exercising the same range of options available for leverage to obtain a guilty plea so as to avoid going to trial.[2] On the one hand, the prosecutor, who has the discretion whether to indict on the enhancement charge, seeks an indictment on a principal charge plus the enhancement charge and then seeks a plea of guilty and in return will drop the enhancement charge. On the other hand, the prosecutor indicts on a principal charge and attempts to obtain a guilty plea, holding in reserve the possibility of returning to the grand jury for indictment under the enhancement statute if no guilty plea is obtained. The Sixth Circuit's decision finds in this case that one way of arriving at the same stakes is unconstitutionally vindictively motivated while the other way of arriving at the same point is an accepted practice in the useful process of plea bargaining.

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[2]The Sixth Circuit seemed to hold in an order filed 1-26-77 vacating judgment and remanding to the district court for hearing about prosecutor's conduct in pretrial plea negotiations in **John R. Gaston** v. **Henry E. Cowan, No. 76-1612,** that there is no per se violation of due process if the record shows no more than bringing certain charges against the defendant and then later reindicting under the habitual criminal statute. The absence or the presence of the "threat" is the turning point.

There are good reasons for not indicting on an enhancement charge in the first instance and these reasons work to the advantage of the accused rather than the prosecutor. If there is no enhancement charge the amount set for bail will usually be significantly less. Also, while a prosecutor does not have to offer to enter into plea discussions with an accused, neither does he want to go to trial if that can be avoided. If the prosecutor is going to offer a term of years for the plea of guilty and if the accused has already been indicted under an enhancement statute, the prosecutor must also offer to dismiss the enhancement charge because if a plea of guilty is entered on an enhanced indictment, the only possible punishment would be that called for under the enhancement statute. Thus, even though a prosecutor would rather wait to see if going to trial was unavoidable because plea discussions failed before seeking an indictment under the enhancement statute, the decision of the Sixth Circuit in the present case would compel obtaining a charge under the enhancement statute in the first instance before the grand jury.

Moreover, the unconstitutional vindictiveness alleged to exist in the plea bargaining practice involved in the present case pales when a comparison is made to plea bargaining practices such as offering to amend a felony count to a misdemeanor, but upon rejection of the offer, seeking at trial the maximum penalty permitted for the felony offense. Or, the offer to drop multiple felony counts of an indictment for a plea of guilty upon just one count, but upon rejection of the offer, seeking at trial the maximum penalty permitted on each of felony counts. The whole practice of plea bargaining is coercive. While there is a mutuality of advantages for the prosecutor and the accused

in plea bargaining, the risks involved in plea bargaining rest exclusively upon the accused. If the bargain offered by a prosecutor is not accepted, an accused in the assertion of his trial rights must face the inevitable risk of a harsher penalty upon conviction after a trial. Just as the practice of plea bargaining is not unconstitutional as determined by this Court, neither is the particular plea bargaining practice involved in this case.

The petitioner believes further that it is inescapably necessary to consider this case from the perspective of what the very definite controlling law would be on the situation if Hayes would have chosen to plead guilty and have taken the five years on the uttering of a forged instrument charge rather than having risked facing the habitual criminal charge and the possibility upon conviction of receiving life imprisonment. Clearly such a possibility as this, which could have resulted from the very practice proscribed by the Sixth Circuit, would be found to be constitutionally permissible. A plea of guilty motivated by a desire to avoid harsher punishment has been found to be not involuntary if it is a well-considered, prudent choice of the lesser of two evils. *Brady* v. *United States*, 397 U.S. 742 (1970); *McMann* v. *Richardson*, 397 U.S. 759 (1970), and *Parker* v. *North Carolina*, 397 U.S. 790 (1970).

CONCLUSION

The petitioner believes that a prosecutor may constitutionally seek an additional indictment, specifically under an enhancement statute, if an accused chooses to stand trial rather than plead guilty to an offer made by the prosecutor on the original charge. The fact that an accused after

rejecting the plea bargain offer must face the risk and in fact realize a harsher penalty upon conviction does not demonstrate a due process violation. For the foregoing reasons set forth in this brief, the petitioner submits the judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert L. Chenoweth, one of counsel for petitioner, hereby certify that the foregoing Brief for Petitioner was served on respondent by depositing three copies each of same in the United States mail, first class postage prepaid, this 15th day of July, 1977, addressed to counsel for petitioner, HONORABLE J. VINCENT APRILE, II, Assistant Deputy Public Defender, 625 Leawood Drive, Frankfort, Kentucky 40601.

Robert L. Chenoweth

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ADDENDUM

CONSTITUTION OF UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV

Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

KENTUCKY REVISED STATUTES

431.190 *Conviction of felony; punishment on second and third offenses.*

Any person convicted a second time of felony shall be confined in the penitentiary not less than double time of the sentence under the first conviction; if convicted a third time of felony, he shall be confined in the penitentiary during his life. Judgment in such cases shall not be given for the increased penalty unless the jury finds, from the record and other competent evidence, the fact of former convictions for felony committed by the prisoner, in or out of this state.

532.080 *Persistent felony offender sentencing.*

(1) When a defendant is found to be a persistent felony offender, the jury, in lieu of the sentence of imprisonment assessed under KRS 532.060 for the crime of which such person presently stands convicted, shall fix a sentence of imprisonment as authorized by subsection (6) of this section. When a defendant is charged with being a persistent felony offender, the determination of whether or not he is such an offender and the punishment to be imposed pursuant to subsection (6) of this section shall

be determined in a separate proceeding from the proceeding which resulted in his last conviction. Such proceeding shall be conducted before the court sitting with the jury that found the defendant guilty of his most recent offense unless the court for good cause discharges that jury and impanels a new jury for that purpose.

(2) A persistent felony offender in the second degree is a person who is more than twenty-one years of age and who stands convicted of a felony after having been convicted of one (1) previous felony. As used in this provision, a previous felony conviction is a conviction of a felony in this state or conviction of a crime in any other jurisdiction provided:

(a) That a sentence to a term of imprisonment of one year or more or a sentence to death was imposed therefor; and

(b) That the offender was over the age of eighteen years at the time the offense was committed, and

(c) That the offender:

1. Completed service of the sentence imposed on the previous felony conviction within five (5) years prior to the date of commission of the felony for which he now stands convicted; or

2. Was on probation or parole from the previous felony conviction at the time of commission of the felony for which he now stands convicted; or

3. Was discharged from probation or parole on the previous felony conviction within five years prior to the

date of commission of the felony for which he now stands convicted.

(3) A persistent felony offender in the first degree is a person who is more than twenty-one years of age and who stands convicted of a felony after having been convicted of two or more felonies. As used in this provision, a previous felony conviction is a conviction of a felony in this state or conviction of a crime in any other jurisdiction provided:

(a) That a sentence to a term of imprisonment of one year or more or a sentence to death was imposed therefor; and

(b) That the offender was over the age of eighteen years at the time the offense was committed; and

(c) That the offender:

1. Completed service of the sentence imposed on any of the previous felony convictions within five (5) years prior to the date of the commission of the felony for which he now stands convicted; or

2. Was on probation or parole from any of the previous felony convictions at the time of commission of the felony for which he now stands convicted; or

3. Was discharged from probation or parole on any of the previous felony convictions within five (5) years prior to the date of commission of the felony for which he now stands convicted.

(4) For the purpose of determining whether a person has two or more previous felony convictions, two or

more convictions of crime for which that person served concurrent or uninterrupted consecutive terms of imprisonment shall be deemed to be only one conviction, unless one of the convictions was for an offense committed while that person was imprisoned.

(5) A person who is found to be a persistent felony offender in the second degree shall be sentenced to an indeterminate term of imprisonment pursuant to the sentencing provisions of KRS 532.060(2) for the next highest degree than the offense for which convicted. A person who is found to be a persistent felony offender in the second degree shall not be eligible for probation, shock probation or conditional release.

(6) A person who is found to be a persistent felony offender in the first degree shall be sentenced to imprisonment as follows:

(a) If the offense for which he presently stands convicted as a Class A or Class B felony, a persistent felony offender in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than twenty years nor more than life imprisonment; or

(b) If the offense for which he presently stands convicted is a Class C or Class D felony, a persistent felony offender in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than ten nor more than twenty years.

(7) A person who is found to be a persistent felony

offender in the first degree shall not be eligible for probation, shock probation, or conditional discharge, nor for parole until having served a minimum term of incarceration of not less than ten years.